No. 83-1290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and VALDUS ADAMKUS, REGIONAL ADMINISTRATOR, REGION V, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Mobil is seeking a writ of certiorari to have this Court reverse a plainly erroneous decision by the Seventh Circuit which would allow the Environmental Protection Agency (hereinafter "EPA" or "the Agency") to intrude upon the private property of thousands of persons in contravention of the Fourth Amendment and in excess of EPA's statutory authority. Mobil's petition demonstrated that, in obtaining a warrant to sample internal wastewater streams within Mobil's refinery, EPA failed to satisfy the requirements for probable cause enunciated by this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). In its response, the Government has not shown that EPA established probable cause. Instead, the Gov-

ernment has simply asserted that EPA's affidavits met the *Barlow's* standards and suggested that because Mobil was not subjected to "deliberate harassment" or more than "minimal . . . intrusions upon its normal operations," it has nothing to complain about. In the alternative, the Government has asked for denial of Mobil's Fourth Amendment claim because of an alleged failure to preserve the issue before the court of appeals. But nothing the Government suggests in any way mitigates the plain error committed by the courts below or vitiates the appropriateness of the Court granting certiorari to review this important constitutional issue.

Mobil's petition also demonstrated that EPA had no authority under section 308 of the Clean Water Act [1] to seize samples of Mobil's internal wastewater streams. In response, the Government has avoided any discussion of the specific points raised by Mobil. Rather, the Government has cited a standard rule of statutory construction but has misapplied it to the statute at issue and the facts of this case. Given EPA's intent to construe broadly the Seventh Circuit's interpretation of section 308 and apply it to industrial facilities across the nation, the erroneous decision below presents an issue of statutory construction of substantial federal importance that should be addressed by the Court.

THE GOVERNMENT HAS FAILED TO DEMONSTRATE THAT EPA'S ACTIONS MET THE MINIMAL REQUIREMENTS OF *BARLOW'S*

In its petition, Mobil demonstrated that EPA's request for a warrant failed to describe an administrative inspection plan based on neutral criteria and failed to explain why Mobil's refinery satisfied the criteria of such a plan—the minimal requirements imposed by *Barlow's*. (Pet. 15). The Government's response never attempts to

[1] The Federal Water Pollution Control Act, as amended, (commonly known as the Clean Water Act), 33 U.S.C. § 1318 (1982).

explain how those two requirements of *Barlow's* have been satisfied.

The Government claims that the affidavits submitted by EPA in support of its request for a warrant described "an ongoing EPA program to monitor facilities having some potential for discharge of toxic pollutants." (Opp. 10). But this statement is no less conclusory than the one found constitutionally defective in *Barlow's*, where the Secretary of Labor had alleged that "the desired inspection and investigation are contemplated as a part of an inspection program designed to assure compliance with the Act."[2] As in *Barlow's*, a search directed at "facilities having some potential for discharge of toxic pollutants" is not circumscribed by any meaningful and specific neutral criteria. There are 125 toxic pollutants regulated by the Clean Water Act.[3] Virtually every source in every source category regulated by the Clean Water Act has "some potential" for discharging one or more of these toxic pollutants. Yet EPA in its affidavits did not explain which of the 125 toxic pollutants were being monitored by the program, which of the 34 industrial point source categories[4] regulated by the Agency were being given priority for inspection, or how particular sources, such as Mobil's refinery, were selected from within a point source category.

The Government attempts to mitigate the thoroughly conclusory nature of EPA's affidavits by alluding to EPA's claim of a need for samples of Mobil's internal wastewater streams, and by asserting that the search at issue was of limited scope and duration. Such a bare claim of necessity is always the excuse of an overreaching

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[2] *Barlow's*, 436 U.S. at 323 n. 20.

[3] 33 U.S.C. § 1317(a)(1) (1982); 40 C.F.R. Part 122, Appendix D, Tables II and III (1983).

[4] 40 C.F.R. Part 122, Appendix A (1983).

administrative agency. As *Barlow's* makes evident, however, that claim can only be tested, and arbitrariness prevented, by an agency's disclosure of the neutral, statutorily based criteria guiding the inspection and by an explanation of how the object of the inspection fits those criteria. Moreover, a specifically limited search is no substitute for satisfying these two threshold requirements of *Barlow's*.[5] Rather, a limitation on scope and duration is merely a third constitutional requirement not at issue in this case.[6]

Finally, the Government observes that Mobil has not demonstrated discriminatory treatment, deliberate harassment, or significant intrusion upon its normal operations. (Opp. 10). In effect, the Government contends, without citation, that the Fourth Amendment requires the party whose private property has been invaded to carry the burden of demonstrating deliberate government harassment and the substantial nature of the government's intrusion. This stands the Constitution on its head. It is indisputable that, before a search warrant may issue, it is the Government which must shoulder the burden of demonstrating probable cause to intrude upon the private property of an individual or commercial establishment.[7] If the Government fails to sustain its burden, as is manifestly the case here, a person or commercial establishment has an absolute right of privacy without having to

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[5] Mobil does not concede that the scope of the search was reasonably limited.

[6] *See Barlow's*, 436 U.S. at 323 n. 21. In any event, the limits on the scope and duration of a search must be rationally related to the purposes and neutral criteria of the administrative plan and can, therefore, be appropriately determined by the magistrate only after the plan has been fully described. Since EPA has never enumerated the specific neutral criteria underlying its inspection program, the reasonableness of the warrant's limitations on scope and duration is not yet ripe for consideration.

[7] *Barlow's*, 436 U.S. at 320.

make some further showing about the motive or effect of the Government's intrusion.

This is all the Government offers to justify EPA's intrusion into Mobil's property. Plainly, the Government has failed to show that EPA satisfied its burden of showing probable cause in this case. This Court should not condone the Government's evident attempt to dilute so substantially the protection of the Fourth Amendment.

The Government's other argument with regard to the Fourth Amendment violation is that, as a procedural matter, it is not properly before this Court because Mobil failed to raise it before the Seventh Circuit. (Opp. 9). This assertion is simply incorrect. Mobil raised and argued the constitutional issue in the district court,[8] and in the Seventh Circuit (Pet. C.A. Br. 37, Pet. C.A. Reply Br. 22).[9] That the Seventh Circuit failed to address this substantial and obvious constitutional issue, but chose only to discuss the issue of statutory construction, should not bar this Court from hearing and deciding Mobil's constitutional claim.

Moreover, even assuming *arguendo* that the issue was not raised in the court of appeals,[10] this Court should nevertheless grant certiorari to review Mobil's constitutional claim. This Court has always recognized the inapplicability of the rule stated in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), when consideration of an issue is necessary to correct a "plain error" committed by a federal court below. *Washington v. Davis*, 426 U.S. 229, 238 n.9 (1976); *Silber v. United States*, 370 U.S. 717, 718 (1962). This is emphatically true when the error "was on a vital phase of the case and

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[8] Pet. 7.

[9] Pet. 8-9.

[10] The Government does not dispute that the constitutional claim was raised, argued, and ruled upon in the district court.

affected the substantial rights of the defendants." *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947). As demonstrated in Mobil's petition for certiorari, EPA's affidavits plainly failed to meet the minimal requirements of *Barlow's*.[11] Nothing said in the Government's response has explained this manifest failure. Unquestionably, the plain error committed by the Seventh Circuit infringes upon Mobil's substantial, constitutional right to be free of unreasonable searches and seizures. This Court should, therefore, grant Mobil's petition in order to correct that plain error.

THE SEVENTH CIRCUIT'S ERRONEOUS INTERPRETATION OF SECTION 308 PRESENTS AN ISSUE OF SUBSTANTIAL FEDERAL IMPORTANCE

In support of its request that this Court review the Seventh Circuit's erroneous interpretation of section 308 of the Clean Water Act, Mobil demonstrated that the scope of EPA's sampling authority under that provision presented a question of first impression and substantial federal importance to the enforcement of the nation's environmental laws (Pet. 18, 21), and noted that EPA intended to rely upon the Seventh Circuit's broad interpretation of section 308 as a license to undertake a broad program of internal sampling at numerous facilities subject to the Clean Water Act. (Pet. 18).

In its opposition the Government does not dispute the importance of this statutory question. Nor does the Government disavow EPA's intention to apply the Seventh Circuit's interpretation on a nationwide basis. Instead, the Government claims the absence of a conflict among the circuits in support of its view that the Court should decline to address the scope of section 308. Without any reasoned analysis, the Government also maintains that the Seventh Circuit's construction of section 308 was correct. (Opp. 11).

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[11] Pet. 14-18.

The Government's observation regarding the absence of conflicting decisions misses the point. The existence of such a conflict is not a prerequisite to review by this Court. *See* Sup. Ct. R. 17.1(c). It is sufficient if the case presents a question of substantial federal importance.[12] This is just such a case. Given the pervasiveness of the Clean Water Act and other environmental laws granting EPA authority similiar to that conferred by section 308, the scope of EPA's inspection and sampling authority under that provision is of great concern to a broad range of industrial facilities. (Pet. 18-21). The *amicus curiae* brief filed by the American Petroleum Institute in support of Mobil's petition attests to the vital interests of American industry in this Court's ruling on the scope of EPA's authority under section 308.

The interpretation of section 308 proffered by the Government in its opposition further highlights the need for review by this Court. The Government proposes a reading of the statute that narrowly focuses upon what it alleges to be the "ordinary" meaning of the statutory term "effluent". (Opp. 11-12). In order to derive the "ordinary" meaning of this term, the Government relies exclusively upon a seven-year-old dictionary reference that defines "effluent" as "something that flows out" without indicating from where it flows. (Opp. 12).[13]

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[12] Indeed, the Government itself has recently sought certiorari in a case involving the Clean Water Act in which there is no conflict among the circuits. United States Environmental Protec ion Agency v. Natural Resources Defense Council, *petition for cert. filed*, 52 U.S.L.W. 3652 (U.S. March 6, 1984) (No. 83-1373).

[13] The Government's myopic focus upon the dictionary definition of "effluent" runs afoul of Judge Learned Hand's admonition recently cited by this Court in Watt v. Alaska, 451 U.S. 259, 266 n. 9 (1981):

> [I]t is one of the surest indexes (sic) of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative

The Government's failure to consider or more than fleetingly mention the surrounding statutory context in which Congress used the term "effluent" underscores the superficiality of its analysis. The meaning of an undefined technical term in a complex statute can be discerned only by viewing it in the statutory context in which it is used. *See Watt v. Western Nuclear, Inc.*, 103 S. Ct. 2218, 2223-24 (1983); *Metropolitan Edison Company v. People Against Nuclear Energy*, 51 U.S.L.W. 4371, 4373 (U.S. April 19, 1983); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 73-75 (1980); *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 126-28 (1977). In the context of the Clean Water Act, Congress' definition of similar terms such as "effluent limitation" and "discharge of a pollutant" provides convincing evidence that "effluent" should not be construed to include internal wastewater streams prior to discharge into navigable waters. (Pet. 22).

The Government's bland assertion that its interpretation of the "ordinary" meaning of the term "effluent" to include internal wastewater streams effectuates the purposes of the Clean Water Act simply ignores the statute's express limitation on EPA's authority. Contrary to the Government's suggestion, Congress did not unconditionally grant EPA the authority to sample wastewater streams at any point in the treatment process. Instead, as Mobil has demonstrated, Congress expressly limited EPA's sampling authority only to those effluents "the owner or operator is required to sample", 33 U.S.C. § 1318(a)(B)(ii) (1982). (Pet. 23). EPA has never promulgated a rule requiring petroleum refineries to conduct internal wastewater stream sampling. Nor does Mobil's NPDES permit require it to perform such sampling. In the absence of any obligation upon Mobil to

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discovery is the surest guide to their meaning (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945)).

sample its internal wastewater streams, the statute plainly does not authorize EPA to engage in such sampling. (Pet. 23-24).

While petitioner could elaborate on the reasons why the Government's arguments are meritless, the Government's analysis is so superficial that petitioner sees no need to repeat what has already been said in its petition. Indeed, it is clear that the Government has no sound arguments to support the Seventh Circuit's holding on the extent of EPA's authority under section 308.

CONCLUSION

For the reasons set forth above and in the petition itself, the petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this case should be granted.

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